Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Interveners)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO F432 OF 1981
ANUAR J
3 JUNE 1996

Contract *— Sale and purchase of land — Charged land — Developer charged land to bank for loan after signing sale and purchase agreement in breach of r 12 of Housing Developers (Control and Licensing) Rules 1970 — Provisions in agreement allowed developer to do so — Bank granted bridging loan to developer although developer unlicensed — Developer defaulted — Whether charge valid — Whether purchasers entitled to title of land free of encumbrances*

Contract *— Illegality — Charge — Developer sold land to purchaser — Charged land to bank for loan subsequently in breach of r 12 of Housing Developers (Control and Licensing) Rules 1970 — Provisions in agreement allowed developer to do so — Whether contrary to letter and spirit of Rules — Whether charge illegal — Whether charge void ab initio — Housing Developers (Control and Licensing) Rules 1970 r 12 — Contracts Act 1950 s 24*

Contract *— Illegality — Charge — Developer sold land to purchaser — Developer unlicensed in breach of s 5 of Housing Developers (Control and Licensing) Act 1966 — Bank granted bridging loan to developer — Developer created charge over land in favour of bank — Whether charge illegal*

Land Law *— Charge — Order for sale — Bank granted bridging loan to developer — Developer created charge over land in favour of bank — Developer unlicensed in breach of s 5 of Housing Developers (Control and Licensing) Act 1966 — Charge created after developer sold land to purchaser in breach of r 12 of Housing Developers (Control and Licensing) Rules 1970 — Whether charge void ab initio — Whether charge enforceable*

Land Law *— Indefeasibility of title and interests — Registered charge — Illegal charge — Whether indefeasible — Whether order of sale could be granted — National Land Code 1965 s 340(2)(b)*

MK Retnam Holdings Sdn Bhd ('the defendant') was the registered owner of a few lots of land ('the lands') in Ulu Kinta, Perak. In 1978, the defendant entered into a sale and purchase agreement ('the agreement') with a Mr Bhagat Singh ('the purchaser') under which the defendant had sold a piece of land with a house erected thereon to the purchaser. Pursuant to cll 3 and 4 of the agreement, it was agreed that the defendant 'may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement', provided that the land 'shall be free from any encumbrance immediately prior to the handing over of vacant possession of the building to the purchaser'. The defendant then purportedly created

a charge ('the charge') under s 241 of the National Land Code 1965 ('the NLC') over its lands in favour of Keng Soon Finance Bhd ('the plaintiff') as security for a bridging loan granted to the former. The defendant later defaulted, and the plaintiff commenced action in the High Court by way of originating summons for an order that the lands be sold by public auction under ss 256 and 257 of the NLC. On 25 August 1982, the High Court judge dismissed the plaintiff's originating summons on the grounds, inter alia, that the charge was invalid and unenforceable as cll 3 and 4 of the agreement only allowed the defendant to create encumbrances which would not place the lands in jeopardy of being sold, and not a charge. The judge further allowed the purchaser, who had paid a total of RM12,227.50 to the defendant to date, to be added as an intervener in the action. The plaintiff appealed to the Federal Court. However, the appeal was dismissed on 4 August 1983 (see [1983] 2 MLJ 384). Prior to the hearing of the appeal before the Federal Court, the purchaser filed a suit in the High Court against the defendant for specific performance of the agreement and contractual statutory indemnity ('the specific performance action') under the Rules made under the Housing Developers (Control and Licensing) Act 1966 ('the 1966 Act'). The High Court judge held that the agreement was void on the ground that the defendant had contracted out of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970 ('the 1970 Rules') which had the primary object to protect the consumers. He went on to order the defendant to specifically perform the agreement and to pay indemnity to the purchaser (see [1984] 2 CLJ 100). During the cross-examination of the defendant's director in the specific performance action, the fact that the defendant did not possess a developer's licence in breach of s 5(1) of the 1966 Act came to light. The defendant's appeal to the (then) Supreme Court against the decision was dismissed (see [1985] 2 MLJ 212). The defendant did not comply with the judge's order, and the housing project was later abandoned. As far as the Federal Court's order dated 4 August 1983 was concerned, the plaintiff had appealed to the Privy Council. The purchaser was also granted special leave to respond to the appeal. The judicial committee, however, concluded that the issue of illegality stemming from the unlicensed nature of the defendant's business was a substantial issue of fact which may have a material bearing upon the matter which could only be determined by the Malaysian courts. Thus, the originating summons was remitted to the (then) Supreme Court of Malaysia for its adjudication. The Supreme Court ordered that the originating summons be further remitted to the High Court of Malaya at Kuala Lumpur for determination of the questions referred by the judicial committee of the Privy Council.

A B C D E F G H I

Held, dismissing the plaintiff's application for order for sale, ordering the plaintiff to deliver to the Registrar of Titles the original issue documents of title of the land with the duplicate charge for cancellation of the memorial of the void charge, and ordering the senior assistant registrar of the High Court to execute a memorandum of transfer over the land in favour of the purchaser:

(1) A court will not enforce a contract which is expressly or impliedly prohibited by statute (see p 449I); *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 followed.

(2) Whilst s 5(1) of the 1966 Act does not expressly provide that any contract entered into in contravention of the Act is illegal, it is the duty of the court to investigate the substance of the legislation. When the court ascertains that the contract has been prohibited by the Act, then the result is that such a contract (in this case, charge) is void and unenforceable pursuant to s 24 of the Contracts Act 1950 (see pp 449I–450A); *Re Mahmoud and Ispahani* [1921] 2 KB 716 followed.

(3) A contract to commit a common law or statutory crime will be illegal if it is entered into with the intention of committing the wrong. In this case, the object of the conract was to defraud a third party, ie the purchasers of the housing accommodation. The court took judicial notice of the fact and refused to enforce the contract, even though its illegality had not been pleaded by the defendant (see p 450E–F).

(4) Rule 12(1)(b) of the 1970 Rules provides that every contract of sale shall contain within its terms and conditions provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser. The defendant had included cll 3 and 4 of the agreement with the obvious intention of circumventing the mandatory clauses made under the Rules. This was a violation of the letter and spirit of the 1970 Rules, which was a consumer protection legislation. It followed that the contract was one which 'on its face' was illegal (see pp 450G, 452F–I and 453A–E); *MK Retnam Holdings Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212 , *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 and *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 followed.

(5) The illegality in this case was of the kind for which the 1970 Rules (in particular r 17) and the 1966 Act (in particular s 18) attracted criminal sanctions, and as such the plaintiff's position was that of *particeps criminis*. The court will not interpose actively in favour of a party who is *particeps criminis* in an illegal or

fraudulent transaction (see p 450H); *Beresford v Royal Insurance Co Ltd* [1938] AC 586 followed. A

(6) Where the only illegality of agreement (charge) is that it infringes a statute which was passed for the benefit of a class of persons of whom the interveners are members, then the illegality will not prevent them from recovering (see p 451D); *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1990] 2 MLJ 365 followed. B

(7) A charge created under the NLC shall take effect upon registration so as to render the land as security in accordance with the provisions thereof. However, the plaintiff, as intended chargee, could not receive such security because it had no developer's licence to provide money for housing development; and no powers to provide finance for the unlicensed housing developer. Consequently, the purported charge was a nullity, and was incapable of being registered to create any security over the lands. The charge being void ab initio, the plaintiff could not get the order for sale from the court (see pp 452C–E, 453F, I and 455I). C D

(8) Section 340(2)(b) of the NLC denies the registration, and the court cannot cure the defect of a void instrument. As such, nothing was achieved by registration except perhaps deferred indefeasibility. Thus, the title or interest of the defendant was free from encumbrances of the purported charge, but not that of the purchaser (see p 454D). E

(9) From the evidence, the court was satisfied that under the circumstances of this case, the purchaser was entitled to the title free from encumbrances to be registered in his name without further litigation because the defendant owed to him by way of indemnity for late delivery sums far greater than the balance purchase price payable but not due under the agreement. Further, the defendant had abandoned the project and had been wound up on 18 October 1994 (see pp 458I and 459A). F G

[Bahasa Malaysia summary

MK Retnam Holdings Sdn Bhd ('defendan') merupakan tuan punya berdaftar beberapa lot tanah ('tanah tersebut') di Ulu Kinta, Perak. Dalam tahun 1978, defendan telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') dengan seorang bernama Encik Bhagat Singh ('pembeli') di bawah mana defendan menjual sebidang tanah bersama dengan sebuah rumah yang dibangunkan di atasnya kepada pembeli. Menurut fasal 3 dan 4 perjanjian tersebut, telah dipersetujui bahawa defendan 'boleh menakluk tanah yang dijual kepada pembeli kepada bebanan pada bila-bila masa selepas menandatangani perjanjian ini', dengan syarat bahawa tanah itu 'harus bebas daripada H I

A sebarang bebanan dengan segera sebelum menyerah milikan kosong bangunan itu kepada pembeli'. Defendan kemudiannya telah mewujudkan suatu gadaian ('gadaian tersebut') di bawah s 241 Kanun Tanah Negara 1965 ('KTN') ke atas tanahnya yang memihak kepada Keng Soon Finance Bhd ('plaintif') sebagai jaminan untuk
B satu pinjaman 'bridging' yang diberikan kepada defendan. Defendan kemudiannya ingkar, dan plaintif memulakan tindakan di Mahkamah Tinggi menerusi saman pemula untuk satu perintah agar tanah tersebut dijual melalui lelong awam di bawah ss 256 dan 257 KTN. Pada 25 Ogos 1982, hakim Mahkamah Tinggi telah menolak saman pemula plaintif atas alasan, antara lain, bahawa gadaian itu adalah
C tak sah dan tidak boleh dikuatkuasakan oleh kerana fasal 3 dan 4 perjanjian tersebut hanya membenarkan defendan mewujudkan bebanan yang tidak akan menyebabkan tanah dijual, dan bukan suatu gadaian. Hakim selanjutnya membenarkan pembeli, yang telah membayar RM12,227.50 kepada defendan setakat ini, ditambah
D sebagai pencelah dalam tindakan itu. Plaintif telah merayu kepada Mahkamah Persekutuan. Namun demikian, rayuan telah ditolak pada 4 Ogos 1983 (lihat [1983] 2 MLJ 384). Sebelum pembicaraan rayuan di Mahkamah Persekutuan, pembeli telahpun memfailkan guaman di Mahkamah Tinggi terhadap defendan untuk pelaksanaan spesifik perjanjian tersebut dan tanggung rugi statutori kontraktual ('tindakan
E pelaksanaan spesifik') di bawah Kaedah-Kaedah yang dibuat di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta 1966'). Hakim Mahkamah Tinggi membuat keputusan bahawa perjanjian tersebut adalah terbatal atas alasan bahawa defendan telah membuat kontrak luar daripada Kaedah-Kaedah Pemaju Perumahan
F (Kawalan dan Pelesenan) 1970 ('Kaedah 1970') yang mempunyai objek utama untuk melindungi para pengguna. Beliau terus memerintah defendan supaya melaksana perjanjian tersebut secara spesifik dan membayar tanggung rugi kepada pembeli (lihat [1984] 2 CLJ 100). Semasa pemeriksaan balas pengarah defendan dalam tindakan pelaksanaan spesifik, fakta bahawa defendan tidak memiliki
G suatu lesen pemaju yang melanggar s 5(1) Akta 1966 telah timbul. Rayuan defendan kepada Mahkamah Agung (pada masa itu) terhadap keputusan tersebut telah ditolak (lihat [1985] 2 MLJ 212). Defendan tidak mematuhi perintah hakim, dan projek perumahan kemudiannya telah ditinggalkan. Berkenaan dengan perintah Mahkamah
H Persekutuan bertarikh 4 Ogos 1983 pula, plaintif telah merayu kepada Majlis Privy. Pembeli juga telah diberi kebenaran khas untuk membalas kepada rayuan. Namun demikian, jawatankuasa kehakiman membuat kesimpulan bahawa isu kepenyalahan undang-undang yang timbul daripada sifat urusniaga defendan yang tidak berlesen merupakan satu isu fakta penting yang mungkin mempunyai pertalian
I material ke atas perkara yang hanya boleh ditentukan oleh mahkamah Malaysia. Dengan demikian, saman pemula telah diremit kepada

Mahkamah Agung Malaysia (pada masa itu) untuk penghukuman. Mahkamah Agung memerintah bahawa saman pemula seterusnya diremit kepada Mahkamah Tinggi Malaya di Kuala Lumpur untuk penentuan persoalan yang dirujuk oleh jawatankuasa kehakiman Majlis Privy.

Diputuskan, menolak permohonan plaintif untuk perintah jualan, memerintahkan plaintif untuk menghantar-serah dokumen hakmilik keluaran asal tanah tersebut dengan gadaian pendua bagi pembatalan memorial untuk gadaian tak sah kepada Pendaftar Hakmilik, dan penolong kanan pendaftar Mahkamah Tinggi untuk melaksanakan memorandum pindahmilik ke atas tanah tersebut yang memihak kepada pembeli masing-masing:

(1) Sebuah mahkamah tidak akan menguatkuasakan suatu kontrak yang dilarang oleh statut sama ada secara nyata atau tersirat (lihat ms 449I); *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 diikut.

(2) Walaupun s 5(1) Akta 1966 tidak memperuntukkan secara nyata bahawa sebarang kontrak yang diikat yang melanggar Akta tersebut menyalahi undang-undang, adalah merupakan kewajipan mahkamah untuk menyiasat kekukuhan perundangan. Apabila mahkamah memastikan bahawa kontrak dilarang oleh Akta tersebut, maka keputusannya ialah bahawa kontrak demikian (dalam kes ini, gadaian) adalah terbatal dan tidak boleh dikuatkuasakan mengikut s 24 Akta Kontrak 1950 (lihat ms 449I–450A); *Re Mahmoud and Ispahani* [1921] 2 KB 716 diikut.

(3) Sesuatu kontrak untuk melakukan jenayah common law atau statutori menyalahi undang-undang jika ia diikat dengan tujuan melakukan kesalahan. Dalam kes ini, tujuan kontrak yang terlibat ialah untuk memfraud pihak ketiga, iaitu pembeli penginapan perumahan. Mahkamah mengambil pengiktirafan fakta kehakiman dan enggan menguatkuasakan kontrak itu, walaupun kepenyalahannya tidak dibentangkan oleh defendan (lihat ms 450E–F).

(4) Kaedah 12(1)(b) Kaedah 1970 memperuntukkan bahawa setiap kontrak jualan harus mengandungi peruntukan terma dan syarat yang mengikat ke atas pemaju perumahan berlesen bahawa sebaik sahaja selepas suatu kontrak ditandatangani pemaju tidak akan menakluk tanah yang dijual kepada pembeli kepada sebarang bebanan tanpa kelulusan awal pembeli. Adalah nyata bahawa defendan telah memasukkan fasal 3 dan 4 perjanjian tersebut dengan tujuan memintasi fasal mandatori yang dibuat di bawah Kaedah itu. Ini merupakan suatu pelanggaran tersurat dan tersirat Kaedah 1970, yang merupakan suatu perundangan perlindungan

pengguna. Dengan itu, kontrak tersebut adalah menyalahi undang-undang 'pada zahirnya' (lihat ms 450G, 452F–I dan 453A–E); *MK Retnam Holdings Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212, *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 dan *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 diikut.

(5) Kepenyalahan dalam kes ini adalah dari jenis yang membawa sanksi jenayah di bawah Kaedah 1970 (khususnya k 17) dan Akta 1966 (khususnya s 18), dan dengan itu, kedudukan plaintif ialah *particeps criminis*. Mahkamah tidak akan mencelah secara aktif untuk memihak suatu pihak yang merupakan *particeps criminis* dalam suatu urusniaga yang haram atau melibatkan fraud (lihat ms 450H); *Beresford v Royal Insurance Co Ltd* [1938] AC 586.

(6) Di mana satu-satunya kepenyalahan perjanjian (gadaian) ialah bahawa ia melanggar suatu statut yang diluluskan untuk manfaat satu kelas orang yang termasuk pencelah sebagai ahli, maka kepenyalahan tidak akan mencegah mereka daripada mendapat kembali (lihat ms 451D); *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1990] 2 MLJ 365 diikut.

(7) Suatu gadaian yang diwujudkan di bawah KTN akan mulai berkesan sebagai jaminan menurut peruntukannya atas pendaftaran tanah. Namun demikian, plaintif, sebagai bakal pemegang gadaian, tidak boleh menerima jaminan sedemikian sebab ia tidak memiliki lesen pemaju untuk menyediakan wang bagi pemajuan perumahan; dan tiada kuasa untuk menyediakan kewangan bagi pemaju perumahan yang tidak berlesen. Akibatnya, gadaian yang dikatakan itu adalah suatu pembatalan, dan tidak boleh didaftarkan bagi mewujudkan sebarang jaminan ke atas tanah tersebut. Oleh kerana gadaian itu adalah terbatal ab initio, plaintif tidak boleh mendapatkan perintah jualan dari mahkamah (lihat ms 452E, 453F, I dan 455I).

(8) Seksyen 340(2)(b) KTN menafikan pendaftaran itu, dan mahkamah tidak boleh membaiki kecacatan suatu instrumen yang tak sah. Oleh yang demikian, tiada apa-apa yang tercapai melalui pendaftaran kecuali ketakbolehan disangkal tangguhan. Justeru itu, hakmilik atau kepentingan defendan adalah bebas daripada bebanan gadaian yang dikatakan, tetapi bukan hakmilik atau kepentingan pembeli (lihat ms 454D).

(9) Berdasarkan bukti, mahkamah berpuas hati bahawa dalam keadaan kes ini, pembeli adalah berhak kepada hakmilik bebas daripada bebanan untuk didaftarkan atas namanya tanpa litigasi lanjut sebab defendan berhutang kepadanya melalui tanggung rugi yang jumlahnya jauh melebihi baki harga belian yang harus dibayar untuk hantar-serah lewat tetapi belum perlu dibayar di

bawah perjanjian jual beli. Lebih-lebih lagi, defendan telah meninggalkan projek dan telah digulung pada 18 Oktober 1994 (lihat ms 458I dan 459A).]

Notes

For cases on illegality of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1733–1810.

For cases on orders for sale, see 8 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1471–1500.

For cases on sale and purchase of lands, see 8 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2063–2136.

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1837–1896.

Cases referred to

Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374

Bahr v Nicolay (1988) 78 ALR 1

Beresford v Royal Insurance Co Ltd [1938] AC 586

Bhagat Singh s/o Surian Singh v MK Retnam Holdings Sdn Bhd [1984] 2 CLJ 100

Breskvar v Wall (1971) 46 ALJR 68

Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1990] 2 MLJ 365

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356

Commercial Bank of Australia Ltd v Amadio (1983) 57 ALJR 358

Daiman Development Sdn Bhd v Mathew Lui Chin Teck (1980) 3 PCC 637

Frazer v Walker & Ors [1967] 1 All ER 649

Gibbs v Messer [1891] AC 248

Gordon v Chief Commissioner of Metropolitan Police [1910] 2 KB 1080

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384

Lloyds Bank Ltd v EB Savory & Co [1933] AC 201

Lyus v Prowsa Developments Ltd [1982] 2 All ER 953

Mahmoud and Ispahani, Re [1921] 2 KB 716

MK Retnam Holdings Sdn Bhd v Bhagat Singh [1985] 2 MLJ 212

Mogul Steamship Co v McGregor Gow & Co [1892] AC 25

Ong Chat Pang v Valliappa Chettiar [1971] 1 MLJ 224

Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32

SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31

St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267

Stern v McArthur (1988) 62 ALJR 588

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81

Tinsley v Milligan [1993] 3 WLR 126

Vasquez v R [1994] 1 WLR 1304

A *UMBC Bhd v Chong Bun Sun & another application* [1994] 2 MLJ 221
UMBC Bhd v Sykt Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352

B **Legislation referred to**
Contracts Act 1950 s 24
Housing Developers (Control and Licensing) Act 1966 ss 3, 5(1), 18, 24
Housing Developers (Control and Licensing) Rules 1970, rr 12(1)(b), 17
C National Land Code 1965 ss 241, 243(1), 256, 257, 340(1), (2)(b)
Specific Relief Act 1950 s 38(2)

Jayanthi Pillai (*Kadir Tan & Ramli*) for the plaintiff/applicant.
Hira Singh (*Asbir Kaur Sangha* with him) (*Asbir Hira Singh & Co*) for
D the first and fifth–12th interveners.
Minderjit Kaur (*Minderjit & Co*) for the fourth intervener.

Anuar J:

The Nature of These Proceedings

E
This is a very exceptional case. It is one of the rare occasions upon which their Lordships of the judicial committee of the Privy Council have been persuaded by a counsel to present his arguments to the board of the Privy Council by way of remission. Mr Hira Singh, who was the counsel appearing
F before their Lordships, was given the honour to present his arguments on the following grounds:

> ... the broader point of illegality stemming from the unlicensed nature of the first respondent's (developer's) business was not one of which he could have reasonably been aware until after the decision of the Federal Court [1985] 2 MLJ 212) when the matter came to light, as their Lordships have been given
> G to understand, as a result of an admission of the first respondent's director in the course of his cross-examination in the specific performance action. But secondly, and more importantly, the point is a substantial one which raises directly the question of the legality of the charge. It is well-established as a general principle that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is appraised of facts tending to support the
> H suggestion, to take notice *ex proprio motu* and even though not pleaded (see eg *Edler v Auerbach* [1950] 1 KB 359) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.
>
> (*Keng Soon Finance Bhd v MK Retnam Holdings* [1989] 1 SCR 291 at p 303)

The judicial committee of the Privy Council concluded at p 303g4 that:

I
> ... there is clearly a substantial issue of fact which may have a material bearing upon the matter and upon which neither Mr William Stubbs QC (for the plaintiff) nor Mr WSW Davidson for the first respondent (defendant) *have any present instructions* as to the extent to which the appellant (Keng

> Soon Finance Bhd) was aware or must be deemed to have been aware of the terms of the sale agreements and of the unlicensed nature of the first respondent's business. It does not appear to their Lordships, therefore, that the difficulty can be met simply by adjourning the matter in order to enable the parties to prepare further arguments, for there are substantial questions both of law and fact which are best determined, and, as far as issues of fact are concerned, can only be determined by the courts of Malaysia. (Emphasis supplied.)

The issues for the determination of this court are:

> restricted to the points arising out of the Rules and the unlicensed nature of the first respondent's (defendant's) business ...
>
> ([1989] 1 SCR 291 at p 304C)

which had been canvassed before the Privy Council, and to make the appropriate orders for costs.

The Proceedings Prior to the Hearing Before Wan Hamzah J (as he then was)

This action was commenced by the plaintiff in the High Court by originating summons issued on 27 June 1981. In the originating summons, the plaintiff sought an order that the lands held under HS(D) Ka 2448/78 to HS(D) Ka 2506/78, Lots No 13507–13565, all in the Mukim of Ulu Kinta, Perak and charged to the plaintiff vide Charge Presentation No 1730/79 Vol 775 Folio 19 (hereinafter referred to as 'the lands') be sold by public auction under ss 256 and 257 of the National Land Code 1965 ('the NLC') to satisfy the total sum due to the plaintiff at the date of such order and interest thereon to the time of sale and consequential relief. The plaintiff claimed to be the chargee under the charge.

By a summons in chambers dated 1 July 1982, Bhagat Singh s/o Surian Singh (hereinafter referred to as 'the first intervener') applied for an order that he be allowed to intervene and be added as an intervener in the action.

This application was supported by an affidavit affirmed by him on 1 July 1982. In this affidavit, he stated, inter alia, that he had entered into a sale and purchase agreement dated 3 November 1978 with the defendant under which he had agreed to purchase from the defendant one of the lots comprised in the lands, with a house being erected thereon; that to date he had paid a total of RM12,227.50 to the defendant; and that he was not in arrears with any stage progress payments.

The Hearing Before, and Judgment of, Wan Hamzah J (as he then was)

The originating summons and the said summons in chambers of the first intervener were heard on 25 August 1982 by Wan Hamzah J, who heard submissions from counsel for the plaintiff, the defendant and the first intervener. There was no cross-examination of any of the deponents and no oral evidence was called by any party.

At the conclusion of the hearing on 25 August 1982, Wan Hamzah J made orders that the first intervener be allowed to intervene in the proceedings, and that the originating summons be dismissed with costs to the defendant and the first intervener, such costs to be taxed. The bill of costs has been taxed and paid.

On 14 December 1982, Wan Hamzah J delivered a judgment in which he gave his reasons for making the said orders. The plaintiff appealed against the said orders to the Federal Court. His Lordship's reason, inter alia, was:

> The defendant opposes the plaintiff's application for order of sale on the grounds set out in the affidavit dated 8 September 1981 affirmed by the chairman and managing director of the defendant company. One of the grounds is stated in paras 4–7 of the affidavit as follows:
>
> 4 The said land was divided into 59 units of single-storey terrace lots but before I made an application to the plaintiff company for the said loan most of the houses had already been purchased by the various people.
>
> 5 During the course of the negotiations for the loan, the plaintiff company obtained from me a list of the names and addresses of the purchasers who had entered into agreements with the defendant company for the purchase of the houses and therefore before the loan was made to the defendants the plaintiffs were fully aware that the various purchasers had already acquired beneficial interests in this property.
>
> 6 The said purchasers have paid to the defendant company a total sum of approximately RM524,612 so far by way of part payments towards the purchase price of the houses.
>
> 7 During the course of the negotiations with the plaintiff company, I specifically informed the plaintiff company that the purchasers had acquired a good title and under no circumstances were their rights to be extinguished or put into jeopardy.
>
> The sale and purchase agreements entered into between the defendant and the purchasers are identical, and cll 3 and 4 thereof are relevant and they read as follows:
>
> 3 Subject to the provisions of cl 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement.
>
> 4 The land sold to the purchaser shall be free from any encumbrance immediately prior to the handing over of vacant possession of the building to the purchaser.
>
> From the evidence tendered, I am satisfied that at the time of negotiating with the defendant and before the execution of the charge, the plaintiff was aware that the defendant had sold the lots, and the plaintiff ought to have enquired about the sale and purchase agreements and be aware of cll 3 and 4 thereof. It is expressly provided that cl 3 is to take effect subject to cl 4. In my opinion this means that the encumbrances which may be imposed on the land under cl 3 must be such that they would not put the land in jeopardy of being sold, because if there was such jeopardy this would prevent vacant possession of the land being handed over to the purchasers

free from encumbrances in accordance with cl 4. In other words cll 3 and 4 exclude a charge of the land. The plaintiff ought not to have accepted a charge of the lots which had already been sold by the defendant. In my opinion the charge is unenforceable to obtain an order of sale for the reason that the plaintiff had taken the charge while it ought to be aware of the position resulting from cll 3 and 4.

Wan Hamzah J held the charge to be invalid and unenforceable as a consequence resulting from cll 3 and 4 of the sale and purchase agreement.

The Federal Court stated in its judgment that Wan Hamzah J gave two reasons for his dismissal of the originating summons: see *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384.

Salleh Abas CJ (Malaya) (as he then was), delivering the judgment of the Federal Court, said at p 386:

The learned judge's ruling:

In dismissing the appellant's application to foreclose the charge the learned judge held that the charge was unenforceable because cll 3 and 4 of the sale and purchase agreement *did not allow the respondent to create the charge* but only such encumbrances as would not place the land in jeopardy of being sold, because otherwise the purchasers would not be entitled to vacant possession free of encumbrances which they were entitled to under the agreement. As an alternative ground the learned judge held that the loan was extended and that being the case the appellant should not be entitled to the foreclosure. (Emphasis supplied.)

By a notice of appeal dated 25 October 1982, the plaintiff appealed to the Federal Court from the order of Wan Hamzah J dated 25 August 1982.

The said appeal was heard by the Federal Court on 5 July 1983, when the Federal Court heard submissions by counsel for the plaintiff, the defendant and the first intervener respectively. At the conclusion of this hearing, the Federal Court directed that the said appeal should stand adjourned for judgment.

On 4 August 1983, the Federal Court delivered its judgment (see [1983] 2 MLJ 384), and made an order dismissing the said appeal with costs.

The Hearing Before, and Judgment of, Abdul Razak J (as he then was)

On 28 March 1983, prior to the hearing of the appeal before the Federal Court on 5 July 1983, the first intervener filed a Civil Suit No 241/1983 in the High Court of Malaya at Ipoh against the defendant for specific performance of the sale and purchase agreement dated 3 November 1978 and contractual statutory indemnity under the Rules made under the Housing Developers (Control and Licensing) Act 1966 (hereinafter referred to as 'HDA 1966').

After hearing evidence from both parties at the trial, Abdul Razak J on 4 May 1984 — after the Federal Court had given judgment on 4 August

1983 — delivered the judgment (*Bhagat Singh s/o Surian Singh v MK Retnam Holdings Sdn Bhd* [1984] 2 CLJ 100) and ordered:

(a) the defendant do specifically perform the sale and purchase agreement dated 3 November 1978 entered between it and Bhagat Singh s/o Surian Singh;

(b) that indemnity be paid by the defendant to the plaintiff at 12% per annum on the purchase price from 2 May 1980 till the date of delivery of vacant possession of the land held under HS(D)Ka 2484/78 for PT 13543, Mukim of Ulu Kinta, District of Kinta, State of Perak together with the house erected thereon by the defendant to the plaintiff; and

(c) that the defendant's counterclaim be dismissed with costs.

To date, the defendant has not complied with the orders of Abdul Razak J. The amount of indemnity now due and payable by the defendant far exceeds the balance of the purchase price payable by the first intervener under the contract, but not due as yet because the housing project has been abandoned.

Abdul Razak J in his judgment made, inter alia, the following findings of facts:

At p 102:

> One cannot conceivably imagine in any case, even if an application for an extension of time had been made, how it could ever have been approved at all because it was clear that at all relevant times the defendant had no licence to act as a developer which was a criminal offence under the Act.

At p 102 para 6:

> In my view, specific performance should lie against the defendant. The defendant said it could not be levied against them since if the appeal by Keng Soon Finance succeeded, then the land would be foreclosed. But I do not see how that should affect the defendant's obligation to the plaintiff to complete the house. If Keng Soon should decide to foreclose the land later, that seems to me to be a matter strictly between Keng Soon and the plaintiff. It has ceased to be the concern of the defendant. In any event, even if Keng Soon Finance should succeed, they could not be expected to foreclose the land without taking into account the interest of the plaintiff, since Keng Soon Finance was fully aware of the right of the latter against the defendant because they had called for and had notice of the agreement (first agreement) before they even decided to issue the loan, as can be seen from the judgment of the Federal Court. It seems to me that under the circumstances equity demands that their right must be subject to the prior right of the plaintiff. Where the equities are equal, the first in time must prevail.

The Hearing Before, and Judgment of, the (then) Supreme Court (Hashim Yeop A Sani, Syed Agil Barakbah and Wan Hamzah SCJJ)

The defendant appealed to the (then) Supreme Court against the whole of the decision of Abdul Razak J. The appeal was dismissed with costs; the

Supreme Court confirming that the learned judge was right in declaring the supplementary agreement void on the ground that the defendant contracted out of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970 (hereinafter referred to as 'HDR 1970'). The admitted aim of the supplementary agreement was to defeat the object of a statute whose primary object is to protect the weak against the strong (see the judgment of the Supreme Court delivered by Hashim Yeop A Sani SCJ in *MK Retnam Holdings Sdn Bhd v Bhagat Singh s/o Surian Singh* [1985] 2 MLJ 212 at p 213).

The Proceedings prior to Hearing Before the Appeal to the Judicial Committee of the Privy Council

By an order of the Federal Court (Raja Azlan Shah LP, Hashim Yeop A Sani and Abdoolcader FJJ) dated 12 December 1983, it was ordered that final leave be granted to the plaintiff to appeal to His Majesty the Yang Di-Pertuan Agong against the whole of the above-mentioned order of the Federal Court dated 4 August 1983.

By special leave of the board of the Privy Council, the first intervener applied to respond to the appeal as a poor person and the same was granted on 6 October 1988.

The Hearing Before, and Judgment of, the Judicial Committee of the Privy Council

The hearing before the board was held on 13 February 1989 and the judgment of their Lordships was delivered by Lord Oliver of Aylmerton on 6 March 1989 allowing the appeal against the defendant and remitted the originating summons to the (then) Supreme Court of Malaysia for its adjudication as against the first intervener. (*Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Bhagat Singh* [1989] 1 SCR 291).

The Hearing Before the Supreme Court on Remission

On 24 September 1990, the Supreme Court consisting of Mohd Azmi, Ajaib Singh and Mohd Jemuri Serjan SCJJ heard and considered the submissions of Encik Kadir Kasim of counsel for the plaintiff, Mr WSW Davidson of counsel for the defendant and Mr Hira Singh of counsel for the first intervener and ordered that:

(a) the originating summons be further remitted to the High Court of Malaya at Kuala Lumpur for determination of all questions referred by the judicial committee of the Privy Council;

(b) the parties to file pleadings; and

(c) an early hearing of the action.

The Hearing Before Me as a High Court Judge on Remission

On 27 October 1993, after all parties had filed their pleadings pursuant to the Supreme Court Order dated 24 September 1990 and answered

A interrogatories, the hearing commenced. However, neither the defendant nor its counsel were present. The defendant's solicitors, Azman Davidson & Co, discharged themselves. The plaintiff changed its solicitors from Shearn Delamore & Co to Kadir, Tan & Ramli.

The first intervener gave evidence on his own behalf and Miss Chia
B Lee Siew gave evidence on behalf of the Secretary of Licensing Division, Ministry of Housing and Local Government. She clearly stated that the defendant had no licence in its possession at the material times. She further stated that subsequent attempts to obtain the developer's licence were irregular, and no valid licence was issued subsequently.

C As far back as 4 May 1984, Abdul Razak J in *Bhagat Singh s/o Surian Singh v MK Retnam Holdings Sdn Bhd* [1984] 2 CLJ 100 at p 102, inter alia, said:

> One cannot conceivably imagine in any case, even if an application for an extension of time had been made, how it could ever have been approved at
D all *because it was clear that all relevant times the defendant had no licence to act as a developer which was a criminal offence under the Act.* (Emphasis added.)

In this case, Encik Mohd Kamil bin Mohd of the Ministry of Housing and Local Government and a witness for the defendant had given evidence that the defendant was not licensed. This was revealed in evidence by Miss
E Chia Lee Siew, who is presently holding the same position as Encik Mohd Kamil. She categorically stated — and this is not challenged — that 'on 8 February 1979, MK Retnam Holdings Sdn Bhd was not issued with a developer's licence' and consequently, the developer could not advertise the sale of houses without an advertisement permit. The charge was
F presented for registration on 8 February 1979.

She was cross-examined at length by counsel for the plaintiff but she stood her grounds and the documentary evidence supported her testimony. She, in fact, suggested that the defendant had tried to do some hanky-panky and she further stated that the controller did not give any approval
G for the change of sale and purchase price or any waiver or extension of time. She stated that the defendant had failed to obtain the developer's licence as it could not meet the conditions that were imposed by the Ministry of Housing. I accept her testimony.

It would have saved judicial time if this reported judgment *Bhagat*
H *Singh s/o Surian Singh v MK Retnam Holdings Sdn Bhd* [1984] 2 CLJ 100 on the matter and directly relevant to the issue before the judicial committee of the Privy Council had been conceded. The counsel for both the chargor and the chargee said they:

> did not have *any present* instructions, as to the extent to which the appellant
I was aware or must be deemed to have been aware of the terms of the sale agreements and of the unlicensed nature of the first respondent's business.
>
> (*Keng Soon Finance Bhd v MK Retnam Holdings* [1989] 1 SCR 291 at p 303h)

They ought to have conceded and the board of the Judicial Committee would have decided on the issue without remission to me. Mr Hira Singh had submitted that the fact in the case was settled before the board of the Judicial Committee of the Privy Council on this issue. See *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Bhagat Singh* [1989] 1 SCR 291 at p 301g2–g4, Lord Oliver in the same judgment on p 301f–h stated: 'it emerged in the course of the hearing, however, that the first respondent was in fact not a licensed housing developer.'

The plaintiff and the defendant answered the interrogatories on 14 February 1992 and 18 November 1991 respectively and were referred to during the hearing.

(a) The plaintiff, by para 3 in answer to the third interrogatory, admitted that it did not enquire as to whether the defendant was a licensed housing developer under the HDA 1966 and the rules made thereunder at the material time.

(b) The defendant by para 5 in an answer to the fifth interrogatory, admitted that it was not on 3 November 1978, the date of the sale and purchase agreement between the defendant and the first intervener, in possession of a developer's licence issued under the HDA 1966 and the rules made thereunder.

(c) The defendant by para 10 in answer to the 10th interrogatory further admitted that it had described itself as a housing developer pursuant to s 5 HDA 1966 in the recital to the sale and purchase agreement entered with its purchasers and further by para 13 in answer to the 14th interrogatory, the defendant when creating the charge stated to the plaintiff that the said lands were expressly subject to the interveners' right.

(d) The defendant by para 12 in answer to the 13th interrogatory admitted that '*it did obtain the prior approval of the intervener before creating a charge over the said land in para 3 of the said sale and purchase agreement*' when there is clear evidence that the intervener was never asked, and never ever gave, any approval to the creation of the charge over the said land.

I make concurrent finding that the defendant was not licensed under the HDA 1966, and it did not have such licence in its possession at all material times. The evidence both oral and documentary produced by the interveners is unrebutted as the plaintiff failed to come to court to give evidence. The evidence as given not only stands unrebutted but on the balance of probabilities, I am satisfied that the evidence adduced is both credible and believable. From such evidence, I hold that the plaintiff had notice of the unlicensed nature of the defendant's business and express notice of the unregistered nature of the intervener's interest.

From all the evidence adduced and other admissions on oath, I find as a fact and concur with my learned brother judge Abdul Razak J's finding in *Bhagat Singh s/o Surian Singh v MK Retnam Holdings Sdn Bhd* [1984] 2 CLJ 100 that both the developer and the financier were not licensed under the HDA Act 1966 and had no licence in their possession at the material times. In this respect, Wan Hamzah J's findings on 25 August 1982 are relevant.

Grace Gnanabaai d/o Jesudasan, another intervener represented by Ms Minderjeet Kaur, gave evidence on her own behalf. It was substantially similar to that of the first intervener.

Ms Jayanthi Pillai, counsel for the plaintiff (now known as Mayban Finance Bhd), did not adduce any evidence despite stating that she would do so. She was given an adjournment to bring witnesses. The rest of the interveners elected to accept the decision in the first intervener's case and relied on the evidence tendered in court.

The Charge under the National Land Code and the Unlicensed Nature of the Borrower's Business

By s 5(1) Housing Developers (Control and Licensing) Act 1966 (No 38 of 1966) it is provided that:

> No housing development shall be engaged in, carried on or undertaken except by a housing developer in possession of a licence issued under this Act.

Section 3 HDA 1966 provides that:

> housing development' means the business of developing or *providing monies for developing* or purchasing, or of partly developing and partly providing monies for purchasing, more than four units of housing accommodation which will be or are erected by such development; and for the purposes of this definition 'develop' means to construct or *cause to be constructed*, and includes the carrying on of any building operations for the purpose of constructing housing accommodation in, on, over or under any land with the view of selling the same or the land which would be appurtenant to such housing accommodation. (Emphasis supplied.)

These provisions have been amended by Act A703 with effect from 1 December 1988. However, the provisions as quoted above were in operation at all material times relevant to this case.

It is clear from the above provisions that a housing developer must be in possession of a licence issued under the Act before it engages in carrying on or undertaking the housing development. This is an absolute prohibition. The housing development has been defined and it includes situations where a person (financier) provides money for such development.

Failure on the part of a contracting party to enquire into, and ascertain, the capacity of the customer as the other party to the contract, prior to entering into the contract, can amount to gross negligence where there is a duty to enquire. It is possible that where there is such a duty and one party deliberately fails to make the appropriate enquiries, such failure may amount to fraud. As a matter of banking practice, a bank will routinely ask for, and will refuse to effect, a contractual relationship until the customer has provided information about the nature of his business, and in particular that any licence necessary for the conduct of that business has been obtained and is valid. This will be so whether or not the bank is lending money and taking security for that loan. In this case, the defendant admitted that such enquiries were in fact not made in a situation where

such an enquiry should have been made in light of the business which the borrower conducted. Further, it is clear from the offer letter dated 25 November 1978 that the bank did not make the grant of the loan conditional upon the developer obtaining or producing a valid developer's licence.

In *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 at p 221, Lord Warrington of Clyffe said:

> The standard by which the absence, or otherwise, of negligence is to be determined must in my opinion be ascertained by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect *themselves* and *others against fraud.* (Emphasis supplied.)

The letter of offer from the bank is reproduced below:

KL Date: 25 November 1978

Registered

Private & Confidential

The Managing Director
MK Retnam Holdings Sdn Bhd
Malayan Bank Chambers (1st Floor)
12 Station Road
Ipoh, Perak

Dear Sir

Subject: Your Application for Bridging Finance Taman Muhibbah, Tanjong Rambutan

We are pleased to advise that your application for a bridging finance has been approved subject to the following terms and conditions:

(1)	Loan Amount:	RM600,000 (Ringgit Six Hundred Thousand Only) to be released as follows:
	RM200,000	On presentation of the charge
	RM400,000	To be released in stages against architect's certificates
	RM600,000	Total secured by charge on property
(2)	Interest Rate:	At 11% pa with monthly rests, the interest of which to be settled monthly.
(3)	Repayment:	From the proceeds of sale of the houses built but not exceeding a period of two years from date of first release of loan. Amount required for the release of each title is RM10,200.
(4)	Security:	The loan is to be fully secured by first legal charge on 59 housing Lots Nos 13507–13565 Mukim of Ulu Kinta, District of Kinta (details of sub-titles to be supplied by you when available).

A The loan will be released only when site/building plans have been approved by the authorities and on presentation of all the 59 subtitles for registration.

All legal documentations in respect of this loan should be prepared by our appointed solicitors, M/s Maxwell Kenion Cowdy & Jones, Ipoh.
Please forward to us your cheque of RM350 for our processing fee.

B Kindly confirm the terms and conditions by signing and returning to us the duplicate copy of this letter.

Yours faithfully
For And On Behalf Of
Keng Soon Finance Bhd

C —Sgd—
Assistant Manager

We accept the above terms and conditions

—Sgd—
D Company's Chop and Signature

It is clear that the offer letter (condition 4) requires the loan to be fully secured by first legal charge on the lands but it has ignored the basic fact: the absence of capacity of the chargor to effect a charge under the NLC. E The plaintiff admitted that it had not enquired of the defendant whether it was in possession of a developer's licence.

The offer letter makes it clear that the loan was provided to the defendant as bridging finance for the housing development noted therein, and on the terms and conditions stated in the letter. The defendant F accepted the offer of the loan on the terms and conditions set out in that letter by signing a duplicate copy of that letter and returning it to the lender. Condition 3 of that letter stated that repayment of the loan was to be made from the proceeds of the sales of the houses constructed by the defendant, and condition 4 required the loan to be secured by a first legal charge over the 59 lots which comprised the estate on which the housing G development was to be constructed. There was no requirement, in the letter or otherwise, for the chargor to produce a housing developer's licence or give any details of such a licence in its name. From this, it is clear that the grant of the loan was not conditional upon the production of a valid licence. The conclusion that can be made as a result of this was that H the plaintiff was happy and willing to provide the loan money regardless of whether or not the developer was licensed as required under the HDA.

A court will not enforce a contract 'which is expressly or impliedly prohibited by statute' (*St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 per Devlin J at p 283). Such a contract 'is unenforceable whether I the parties mean to break the law or not': ibid. Thus, whilst s 5(1) of the HDA 1966 does not expressly provide that any contract entered into in contravention of the Act is illegal, it is the duty of the court to investigate the substance of the legislation to ascertain whether or not the contract is

expressly prohibited: *Re Mahmoud and Ispahani* [1921] 2 KB 716. When the court ascertains that the contract has been prohibited by the Act, then the result is that such a contract (in this case, charge) is void and unenforceable: see s 24 of the Contracts Act 1950:

> 24 The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 at p 361F left col, held:

> Thus, in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

A contract will also be void and unenforceable, and perhaps illegal, if it infringes public policy. A contract to commit a common law or statutory crime will be illegal if it is entered into with the intention of committing the wrong. The rule has been applied when the design or object is to defraud a third party, in this case, the purchasers of the housing accommodation. In such a case, the question of intention is not so important as the contract would be illegal ex-facie because of the contravention of the statute. The court takes judicial notice of the fact and refuses to enforce the contract, even though its illegality has not been pleaded by the defendant. The fact that the HDA 1966 is a legislation with the primary intention of protecting the consumer makes the contract clearly one which 'on its face' is illegal: *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374.

The illegality in this case is of the kind for which the HDR 1970 (in particular, r 17) and HDA 1966 (in particular, s 18) attract criminal sanctions and as such the plaintiff's position is that of *particeps criminis*. In such a case, the court will not interpose actively in favour of a party who is *particeps criminis* in an illegal or fraudulent transaction: *Beresford v Royal Insurance Co Ltd* [1938] AC 586 at p 596. The plaintiff's claim here in clearly beyond the fact of law because it has participated in the illegal transaction (*Gordon v Chief Commissioner of Metropolitan Police* [1910] 2 KB 1080 at p 1090 per Buckley LJ).

The plaintiff was aiding and abetting or assisting the unlicensed housing developer. Lord Oliver in his judgment at p 302B–C said:

Moreover, an unlicensed developer who is carrying on business unlawfully certainly could not claim to be in a better position than a licensed developer. If this is right, then it would follow that the charge, in the absence of express approval by individual purchasers, was created by the first respondent without the authority of the purchasers, of whose interests, quite clearly, the appellant had express notice before the charge was entered into.

Sir Garfield Barwick in *Daiman Development Sdn Bhd v Mathew Lui Chin Teck* (1980) 3 PCC 637 at p 647d5 has this to say:

> ... it seems to their Lordships that upon the proper construction of the proforma [used in that case] the solicitors [for the developer there] would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including for that purpose, of course, provisions to comply with the requirements of the rules.

NH Chan J (as he then was) had occasion to discuss the same issue and held that where the only illegality of agreement (charge) is that it infringes a statute which was passed for the benefit of a class of persons of whom the interveners are members, then the illegality will not prevent them from recovering (see *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1990] 2 MLJ 365). Furthermore, the claimant to an interest whether based on a legal or equitable title, is entitled to recover if he was not forced to plead or rely on an illegality: *Tinsley v Milligan* [1993] 3 WLR 126 (HL).

A contract that is illegal as formed in its inception and is therefore void ab initio is treated as if it had not been made at all (*Mogul Steamship Co v McGregor Gow & Co* [1892] AC 25 at p 39 per Lord Halsbury).

In any event, the plaintiff is deemed to have been aware of the illegality of the charge for the following reasons:

(i) the plaintiff was in business of lending money and obtaining securities from the borrowers; and

(ii) the plaintiff was represented by lawyers (see *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialized Buildings) Sdn Bhd* [1980] 1 MLJ 21).

Finally, the parties (chargor/chargee) had clearly evaded the specific prohibitions imposed by the statute. *Statutory Interpretation* by FAR Bennion (1st Ed) at para 143 states:

> It is the duty of a court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the court will prefer a construction which advances this object rather than one which attempts to find some way of circumventing it.
>
> Fraud on the Act: The courts have frequently held that a construction is to be preferred that prevents evasion of the intention evinced by Parliament to provide an effective remedy for the mischief against which the enactment

is directed. When deliberately embarked on, such evasion is judicially described as a fraud on the Act.

The charge was presented and registered on 8 February 1979. It was purportedly created by the defendant under s 241 of the National Land Code 1965 ('the NLC'). See plaintiff's bundle of documents (encl 83): Form 16A of the NLC.

The section gives powers to the chargor to charge its land subject to sub-s 3, which states:

(3) The said powers shall be exercisable in any particular case subject to —

(a) any prohibition or limitation imposed by this Act or *any other written law for the time being in force*; (Emphasis supplied.)

Such charge shall be effected by an instrument in Form 16A and by s 243 of the NLC, such charge created under this Act shall take effect upon registration so as to render the land as security in accordance with the provisions thereof, express or implied.

The plaintiff, as intended chargee, could not receive such a security because it had:

(a) no developer's licence to provide money for housing development; and

(b) no powers to provide finance for such an unlicensed business of the housing development by the unlicensed housing developer.

Consequently, the purported charge was a nullity and was incapable of being registered to create any security over the land's 59 lots.

Fraud on the Purchasers

The sale and purchase agreement between the defendant and the interveners was not in the proper form as required by the Rules made by the Minister of Local Government pursuant to the powers conferred upon him by s 24 HDA 1966. The HDR 1970 prescribed, inter alia, terms which are compulsory in every contract of sale. Rule 12(1) provides:

Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely: ... (b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser.

However, the defendant signed an agreement with the interveners and by cll 3 and 4 of the agreement provided:

3 Subject to the provisions of cl 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement.

4 The land sold to the purchaser shall be free from any encumbrance immediately prior to the handling over of vacant possession of the building to the purchaser.

A The defendant had included the above provisions with the obvious intention of circumventing the mandatory clauses made under the Rules by imposing on the purchasers a blanket approval upon the signature of the contract. Clause 3 clearly infringes the substance of r 12(1) by negativing the effect of cl 4 by purporting to confer authority on the defendant to create a charge binding on the purchasers. The maxim *Quando aliquid prohibiter* B *fieri, prohibetur ex directo et per obliquum* [whenever a thing is prohibited, it is prohibited whether done directly or indirectly] applies.

By including cl 3 or the sale and purchase agreement which clearly contradicts the mandatory clause provided for in r 12(1)(b) HDR 1970 and on the authority of the (then) Supreme Court in *MK Retnam Holdings* C *Sdn Bhd v Bhagat Singh* [1985] 2 MLJ 212, it is a violation of the letter and spirit of the HDR 1970, and in the words of Hashim Yeop A Sani SCJ (as he then was) at p 213D–E left, 'The primary object of that legislation is to protect the weak against the strong. See also *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31.'

D I adopt the reasoning of Hashim Yeop A Sani SCJ as regards the consumer protection legislation, and any attempt directly or indirectly to evade the protection must necessarily be struck down. The aim of the legislation and accompanied subsidiary legislation is clear: to protect purchasers. See *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 at p 34. Therefore, any attempt to evade the legislation will not be E countenanced by the courts.

The HDA 1966 prohibits the defendant from carrying on housing development and provides criminal sanction for the breach of that prohibition. The defendant, not being in possession of the housing development licence under s 5 HDA 1966, is prohibited from carrying on F the business of housing development — the consequence of which I declare is that the charge is void ab initio and unenforceable. See *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32, where the facts were similar except that in that case there was no authorization of charge by the purchaser. In that case, Ong CJ was troubled by the existence of the right G of third parties — which the chargee sought to ignore — and found the chargee's conduct so unconscionable as to amount to fraud and collusion and upheld the High Court decision and dismissed the appeal (cf *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81).

Indefeasibility

H The charge takes effect under s 243 of the NLC upon registration but the instrument of dealing, ie creation of charge being void ab initio would be a void instrument for the purposes of registration, ie although it was capable of being registered, it was not capable of effecting any charge over the 59 lots. As a consequence, there is in existence no effective or valid, I registered charge as envisaged under the NLC. Therefore, the plaintiff cannot get the order for sale from the court, for the prerequisite to obtain the order for sale is that there must be a valid registered charge created in favour of the plaintiff.

Section 340(1) NLC reads as follows:

> The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

The section will operate to give an indefeasibility title/interest under the charge only when the instrument for registration concludes a valid transaction and in statutory form. Sub-section (2) of s 340 reads:

> operates to prevent a registered instrument from giving an indefeasible title or interest to land where that instrument is subject to a vitiating factor; in this case that vitiating factor was that the instrument was void.

In general, under a strict Torrens system, it is now said that registration cures defects but this is not so if the relevant statute denies this right. Here, s 340(2)(b) denies the registration; the court cannot cure defect of a void instrument. As such, if the court cannot cure the defect in the instrument, nothing is achieved by registration except perhaps deferred indefeasibility. Thus, the title or interest of the defendant is free from encumbrances of the purported charge but not that of the interveners.

Edgar Joseph Jr J (as he then was) in *UMBC Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 at p 355H left col, had the occasion to consider:

> ... what is the effect of registration of the charge in breach of the restriction in interest imposed pursuant to the provisions of s 124(1)(b) of the Code?
>
> In considering this question, I have kept in the forefront of my mind, on the one hand, the well-known canon of construction enunciated by the Federal Court in *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69:
>
> > '... that the meaning and intentions of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient ...
> >
> > However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.'
>
> and, on the other hand, the rule that statutes which encroach on the rights of a subject, whether as regards person or property are subject to a strict construction in the same way as penal statutes. It is also a settled rule that such statutes should be construed, if possible, so as to respect such rights (*Walsh v Secretary of State for India* (1863) 10 HL Cas 367;11 ER 1068 per Lord Westbury; *Hough v Windus* (1883–1884) 12 QBD 224 per Bowen LJ) and, if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted (*JE David v SPA De Silva* [1934] AC 106 and *O'Connor v Isaacs* [1956] 2 QB 288).

A His Lordship concluded at p 356C left col:

> ... the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) ...

B

The application for order for sale is purportedly made under s 253(1) of the NLC, which reads:

> The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates
C in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

Visu Sinnadurai J stated in *UMBC Bhd v Chong Bun Sun & anor application* [1994] 2 MLJ 221 at p 231B:

D In *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, Harun Hasim SCJ in delivering the judgment of the Supreme Court also observed as follows (at p 656):

> '.... under s 256(3), on an application to court for an order for sale by the chargee, it is *mandatory* on the court to order the sale unless it is satisfied of the existence of a cause to the contrary. (Emphasis provided.)'

E The only leeway given to the court, when considering whether an order for sale ought to be made is that provided for under s 256(3) which provides that the court may not grant an order for sale if there is 'any cause to the contrary'. The Privy Council in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd* [1989] 1 MLJ 457 clearly stated that the courts may only
F refuse to make such an order if the making of the order would be contrary to some rule of law or equity: see the Supreme Court decisions in *James Edward Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, where the scope of s 256(3) was also considered, and *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163, where a similar provision in the Sarawak Land Code (Cap 81) was applied.

G The NLC spells out in detail the powers of the court. These are statutory powers and the court cannot act beyond these powers. Any purported exercise of this power by granting a remedy not authorized by the NLC would be ultra vires the NLC, resulting in the sale of the charged property being rendered void, and the registration of the title in the
H purchaser's name not being indefeasible on the ground that the registration was obtained by means of an insufficient or void instrument: see the judgment of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, approved by the Supreme Court in *M & J Frozen Food v Siland Sdn Bhd* [1994] 1 MLJ 294.

I Therefore, I hold that the NLC can only authorize the sale of the land subject to a charge lawfully created under s 241 NLC. It cannot authorize

the sale of the land under s 256 of the NLC which is not the subject to a void albeit registered charge. This being a sufficient cause to the contrary, I dismiss the application for an order for sale.

Mr Hira Singh submitted the Australian High Court authority of *Bahr v Nicolay* (1988) 78 ALR 1, wherein the facts in brief are as follows:

The Bahrs contracted to sell land to Nicolay. The contract included an agreement by Nicolay to lease the land back to the Bahrs for three years and upon the expiration of the lease to enter into a contract to resell the land to them. Before this happened, Nicolay sold the land to the Thompsons who had notice of the prior agreement between the Bahrs and Nicolay. The contract of sale between Nicolay and the Thompsons provided that the purchaser acknowledged that an agreement existed between the Bahrs and Nicolay. The Thompsons subsequently became the registered proprietor of the land. The Bahrs were unaware of the Thompsons' purchase until after the latter obtained registration. There was correspondence between the Bahrs and the Thompsons which acknowledged the agreement that existed between the Bahrs and Nicolay. A caveat was lodged but was ineffective as against the Thompsons. The Bahrs sought to exercise against the Thompsons their rights under the first contract, ie a right to purchase. The Thompsons subsequently denied the Bahrs' claim relying on the indefeasibility provisions of the Transfer of Land Title Act (WA). The Bahrs sought, as against Nicolay and the Thompsons, an order that the land vest in them and alternatively, specific performance of the first contract.

The High Court of Australia found unanimously, albeit on differing basis, in favour of the Bahrs. The Thompsons were to hold their title to the land subject to the Bahrs' interests.

Basis for the decision

The divergence of views over the basis for subjecting the title of the registered proprietor (Thompsons) to the claims of the Bahrs is as follows:

(a) the Bahrs's proprietary action against Nicolay bound the subsequent registered proprietor (ie the Thompsons) because the circumstances raised the fraud exception to indefeasibility — per Mason CJ and Dawson J. However, this conclusion required a 'redefinition' of the fraud exception.

(b) alternatively, the Thompsons held the land for the benefit of the Bahrs on an express trust, so that the Bahrs had a conventional action in personam enforcing a direct and proximate relationship with the registered proprietor.

(c) the Thompsons held the land on a constructive trust for the benefit of the Bahrs.

Thus, the court was enforcing an indirect and remote relationship between the Bahrs and the defendant registered proprietor — per Wilson and Toohey JJ.

Level of Knowledge Required

Many of the equitable doctrines are premised upon a person's knowledge of a state of affairs being the catalyst to the raising of an equity against him. Without that knowledge, there is no justification in equity for holding him out of the full enjoyment of his rights because his 'conscience' is clear. However, controversy centres upon the level of knowledge one must possess before an equity can be raised against him and so give rise to an action in personam. The 'direct confrontation' between the old doctrine of notice and the present 'notice' provision in the NLC is at the forefront where there is an allegation of a registered proprietor acting against an unregistered claimant.

Ordinarily, actual notice of a prior interest is sufficient to impute fraud in equity. It is my view that in the context of the in personam exceptions to indefeasibility, the court should be astute to look at the circumstances of the case. The substance of the agreement between the parties is crucial since equity looks to substance and not to form. The approach should be to engage in a subjective inquiry as to the intention of the registered proprietor as manifested by his conduct, and then to ask objectively if the conclusion to be reached would be fair in the circumstances. This two-tiered test would serve to preserve the policy of the Torrens legislation or at least part of it. At the same time, this approach would maintain a level of public confidence in the judiciary and the administration of justice.

Throughout the period when registration statutes have been in force, a tension has existed between literal compliance with them on the one hand, and the desire to read into them general equitable principles on the other. The effect of introducing these principles is to bind a purchaser with notice of an unregistered interest that is not protected in the appropriate manner by registration.

The most popular method of achieving this result has been to apply the maxim that equity will not allow a statute to be used as an instrument of fraud. This maxim displays a continuing rigour, as is demonstrated by the English decision in *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953 and the Australian decision of *Bahr v Nicolay* (1988) 78 ALR 1 at p 37 per Brennan J.

In recent times, the 'revitalization' of equity has meant that the concept of unconscionability has had a role to play even in the area of registration of title to land. *Bahr v Nicolay* and *Kalyk v Whelan* evidence the continuing existence of equity in the in personam exceptions to indefeasibility.

This revival of 'equity' is also seen in the Australian decisions which deny effect to unconscionable actions. In many cases, unconscionability arises because there was inequality of bargaining power where one party to the contract suffered from a disability, such as lack of education or poverty: *Commercial Bank of Australia Ltd v Amadio* (1983) 57 ALJR 358. The fact

that in this case the purchasers were the subjects of protection under the consumer protection legislation, namely the HDA, is a factor to be taken into account to allow a sympathetic application of equity in their favour: *Stern v McArthur* (1988) 62 ALJR 588.

To some, the expanding scope of the in personam exceptions to indefeasibility, guided by the notion of unconscionability, presents a further inroad into the principle of indefeasibility of title. Although this development seems to stem from an instinctive reaction that a purchaser with actual notice of an unregistered interest should not be allowed to take free from it, there are sound reasons why equity should intervene.

It should be noted that the expansion of equity in this way has been prominent in the Australian system of registration of titles where the principle of immediate indefeasibility applies: *Frazer v Walker & Ors* [1967] 1 All ER 649, *Breskvar v Wall* (1971) 46 ALJR 68. Where the system of registration of titles is one of deferred indefeasibility (*Gibbs v Messer* [1891] AC 248) as it is in Malaysia (see *Ong Chat Pang v Valliappa Chettiar* [1971] 2 MLJ 224), there is no real barrier in principle to a generous application of equity subject to the provisions of the NLC.

Rights should not be lost in the 'welter of registration' — more so where equitable interests and equities are recognized in the Torrens system and the NLC. The extension of the personal actions against purchasers with actual notice of unregistered interests reflects the changed social conditions which form the background to modern conveyancing. In the light of the changed conditions, it does not seem imperative to cling absolutely to the policy that prevailed in the 19th century.

The law should be sufficiently flexible to protect those who have not or are unable to arrange their affairs in a manner most beneficial to themselves. One aspect of the latest development in equity is the increasing penetration of equitable doctrines into contract and commercial law. If equity is willing to intervene in circumstances where resources abound, one might expect it to be more sympathetic towards parties less well-endowed with resources.

Admittedly, to introduce equity into the Torrens system and the NLC entails uncertainties — whether it be uncertainties as to the type of conduct deplored, or uncertainties as to the status of one's title — but to demand too great a certainty in the law is to cry for the moon. The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development and this is so especially where the nature of the Torrens system in Malaysia provides for deferred, rather than immediate, indefeasibility.

From the undisputed evidence — both oral and affidavits available — I am satisfied that under the circumstances of this case, the interveners are entitled to the titles free from encumbrances to be registered in their respective names without further litigation because the defendant owes to the interveners by way of indemnity for late delivery sums far greater than

the balance purchase price payable but not due under the sale and purchase agreement. Since the defendant has abandoned the project and has been wound up on 18 October 1994 vide Ipoh High Court Companies Winding-Up No 28–2–1991, there is no prospect of the balance sum ever being demanded by the defendant as the statutory liquidated damages far exceeds the balance purchase price.

I therefore order that:

(a) the application of the plaintiff for order for sale is hereby dismissed with costs;

(b) the plaintiff do pay costs to the first intervener of:

(i) Privy Council hearing in London; and

(ii) Supreme Court (pursuant to the order of the Supreme Court dated 24 September 1990)

The first intervener responded to the appeal by the plaintiff at the Judicial Committee of the Privy Council ('the JCPC') by special leave to respond as *forma pauperis*. The question of costs was reserved by the JCPC for the determination of this court. The customary recommendation, to my mind, by the JCPC would have been what is the normal practice that the costs follow the event. I am supported in this respect by a recent decision of the Privy Council: *Vasquez v R* [1994] 1 WLR 1304 at p 1316 under the heading 'Costs'.

(c) the plaintiff do deliver to the Registrar of Titles, Perak the original issue documents of title in respect of lands held under the following:

(1) HS (D)Ka 2455/78 PT No 13514, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(2) HS (D)Ka 2476/78 PT No 13535, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(3) HS (D)Ka 2477/78 PT No 13536, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(4) HS (D)Ka 2480/78 PT No 13539, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(5) HS (D)Ka 2484/78 PT No 13543, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(6) HS (D)Ka 2485/78 PT No 13544, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(7) HS (D)Ka 2487/78 PT No 13546, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(8) HS (D)Ka 2488/78 PT No 13547, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(9) HS (D)Ka 2494/78 PT No 13553, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

(10) HS (D)Ka 2498/78 PT No 13557, Mukim of Ulu Kinta, District of Kinta in the state of Perak;

with the duplicate charge dated 27 January 1979 for cancellation of the memorials of void charges;

(d) pursuant to s 38(2) of the Specific Relief Act 1950, the Registrar of Titles, Perak is ordered to cancel the charge memorials over the lands held as enumerated above in para (c); and

(e) the senior assistant registrar of the High Court, Kuala Lumpur do execute a memorandum of transfer over the said lands in favour of the respective interveners.

Order accordingly.

Reported by Isabel Liong